

**The Cooper Health System and JNESO, District 1,  
International Union of Operating Engineers,  
AFL-CIO. Case 4-CA-25918**

March 31, 1999

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND HURTGEN

**DECISION AND ORDER**

On June 11, 1998, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The Cooper Health System, Camden, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Richard Wainstein and Patricia Garber, Esqs.*, for the General Counsel.

*Steven W. Suflas and Meredith S. Francis, Esqs. (Meredith & Greiner)*, of Haddonfield, New Jersey, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 8 and February 18, 1998. Upon a charge filed on April 3, 1997,<sup>1</sup> by the Union, JNESO, District 1, International Union of Operating Engineers, AFL-CIO, the Regional Director for Region 4 issued a complaint on June 13, alleging that Respondent, The Cooper Health System,<sup>2</sup> had violated Section 8(a)(1) and (3) of the National Labor Relations Act, referred to below as the Act, by selectively and disparately enforcing a no-distribution rule against an employee, who was distributing union literature in Respondent's parking garage, and by disciplining the employee. Thereafter, on November 3, the Union filed an amended charge, and on December 12, the Regional Director issued amendments to the complaint alleging that Respondent

had violated Section 8(a)(1) and (3) of the Act by maintaining an excessively broad rule prohibiting union solicitation, prohibiting the distribution of union literature in its parking garage, confiscating union literature from an employee, discriminatorily and selectively enforcing its no-solicitation/no-distribution rule against union activity, prohibiting an employee from distributing union literature on Respondent's premises during the employee's work shift or while wearing work clothes, and by issuing a verbal warning to an employee because she distributed union literature in Respondent's parking facility. Respondent, by its answers to the complaint and the amendments to the complaint, denied committing the alleged unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs<sup>3</sup> filed by the General Counsel and the Respondent, Cooper, I make the following

**FINDINGS OF FACT**

**I. JURISDICTION**

Cooper, a New Jersey corporation operates a tertiary care, teaching hospital at its facility in Camden, New Jersey, where it annually derives gross revenues in excess of \$250,000 in the operation of its hospital and annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of New Jersey. Cooper admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Facts**

Cooper Hospital is a large tertiary care institution licensed for 554 beds. It has the most sophisticated services of any hospital in Southern New Jersey. As a tertiary care institution, Cooper Hospital offers higher level services including trauma, high-risk obstetrics, children's care, and open heart surgery. The sickest patients in Southern New Jersey come to Cooper. I find from the testimony of Leslie D. Hirsch, Cooper's executive vice president and chief operating officer, that Cooper Hospital is "unique among the other hospitals in Southern New Jersey" and is comparable to "the large medical institutions in Philadelphia."

Cooper has approximately 4500 employees, including 300 physicians, 175 residents and house staff, and 865 nurses. There is no collective-bargaining history for any of Cooper's employees. However, in March, the Union began an organizing effort among Cooper's employees.

On March 30, at approximately 6:20 a.m., Donna Conrey, a registered nurse employed by Cooper, began distributing leaflets for the Union in a parking facility adjacent to the Cooper Hospital, where she has worked for the past 6 years. Throughout her employment at Cooper, Conrey has worked in its Trauma Intensive Care Unit, on the night shift, from 7 p.m. until 7 a.m. On this occasion, Conrey was on a break and was dressed in hospital scrubs. She had signed off her patients to another nurse. The Union's leaflet, which she was inserting under auto windshield wipers, invited registered nurses and technicians to a union meeting scheduled for April 10.

<sup>3</sup> Cooper's motion to correct the transcript is granted. Accordingly, certain errors in the transcript have been corrected.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>2</sup> All dates are in 1997 unless otherwise indicated.

<sup>3</sup> The name of the Respondent appears as corrected at the hearing.

The parking facility where Conrey was situated on the morning of March 30, is known as the "Riebal Parkade" or the "Parkade." The Parkade is a mixed use facility where patients, Cooper employees, and visitors may park their vehicles. Cooper's survey of those parking in the Parkade for the period of March through August 1997 shows that between 55 and 60 percent of them were not Cooper employees. Conrey has parked her car in the Parkade on every workday for the duration of her tenure at Cooper. I find from Conrey's testimony that all night-shift employees park their cars in the Parkade.

The Parkade is a cylindrical shaped structure with six levels, designated A through F in ascending order. The entrance and exit to the structure are on Level A. A heliport is located on the top level. An elevator runs from the Parkade's top floor to a level below Level A, where the hospital lobby is located. The elevator empties into the hospital lobby. Camden Renewal Partners, a subsidiary of The Cooper Health System, operates the Parkade. Although Camden Renewal Partners operates the Parkade, I find from the testimony of William A. Zullo, director of security, that Cooper maintains the security for the Parkade, including the provision, on request, of escorts for Cooper employees on weekends and after hours during the week. From Zullo's testimony I also find that Cooper treats the Parkade as part of the hospital's facilities.

Cooper's employees are authorized to park on levels C through F. Visitors and patients may park in spaces designated for visitor parking. On several occasions over the 18 months preceding the hearing in this case, Cooper's security office has sent a stretcher or a wheelchair to the Parkade to move an incoming patient, who needed immediate attention, from a parking space to the hospital. On at least two occasions, Cooper's security has contacted either the nursing unit or the trauma unit to seek help for an arriving patient in the Parkade.

The helipad on the top level of the Parkade receives patients who are airlifted in by helicopter. Adjacent to the pad is an emergency treatment facility known as the Helipad Resuscitation Area, which is fully equipped to provide immediate care for incoming patients. Patients arriving on the helipad in need of immediate care, receive it in the Helipad Resuscitation Area. If the patient is stable, hospital staff members use the Parkade's elevator to transfer the patient to the lobby floor and then to the trauma area.

On the morning of March 30, Conrey began placing the Union's flyers on automobile windshields on Level F and worked her way down to Level C, where she encountered a security guard. The guard was running toward Conrey with flyers in his hand as he spoke into a radio. Conrey heard him say "I have her in sight. She's on level C." The guard ran past Conrey and stopped approximately 20 or 25 feet beyond her.

Conrey approached the guard and asked him what he wanted. The guard said she "shouldn't be doing that." The guard asked for Conrey's name and asked where she worked. She questioned his need for that information. He gave no reason but insisted on answers to his questions. Conrey complied.

Another hospital guard, Dwayne Craig, approached and asked what was going on. The first guard explained that Conrey was putting union flyers on the parked cars. Craig said that she was not allowed to do that. Conrey asked to know on whose authority was she prohibited from placing flyers under the windshield wipers of cars in the Parkade. Craig said he could not tell her. Craig took down Conrey's name and the name of her department. Craig saw a manila envelope in Con-

rey's hand and said that if the envelope contained the same flyers, he would have to confiscate them. Conrey asked who authorized Craig to confiscate the flyers. Craig declined to tell her and again insisted upon confiscating the Union flyers. During a further exchange, Craig conceded that a hospital vice-president told him to confiscate the flyers, and then once again demanded the flyers. Conrey removed the flyers from the envelope, handed them to Craig, and returned to work.

Soon after Conrey returned to the trauma unit, Craig appeared. He asked for a copy of Conrey's ID badge for his director.

On the following day, the director of Trauma Patient Care Services, Catherine Leipold, left a message on Conrey's answering machine asking her to return the call. Approximately 30 minutes after hearing the message, Conrey returned the call. Leipold began the conversation by saying that everything was okay and asking if Conrey was okay. Continuing, Leipold said she knew about the incident and had met with Executive Vice-President and Chief Operating Officer Leslie Hirsch, and Vice President, Patient Care Services, and Chief Nurse Executive Carole Dubocq to discuss the incident. Leipold said that the two executives were concerned about two issues arising from Conrey's activity in the Parkade on March 30. First, the executives were concerned about the time Conrey took her break. Second, they were concerned about Conrey's "solicitation."

Leipold said that the first issue had been resolved. She had explained how the trauma unit functioned and had convinced Hirsch and Dubocq that Conrey's break time was proper. Leipold had spoken to the trauma charge nurse and had learned that Conrey had signed her patients off properly.

Conrey's "solicitation," though, presented a problem. Leipold said she had to act on the solicitation and would issue a verbal warning to Conrey. Leipold explained that she realized employees in the trauma unit sold Avon products, cookies, cakes, and other things. In her view, "people got a little excited because it was Union literature." She stated that when a security report is filed, four hospital officials receive copies. The four included Leslie Hirsch, Carol Dubocq, and the heads of Security and Human Resources, respectively. Leipold said that as these four officials knew about the incident, she had to do something about it. Leipold then sought a meeting with Conrey.

Conrey met with Leipold on April 5, in the manager's office, behind the trauma unit. Also present was the charge nurse who had been on duty when Conrey took her break on the morning of March 30. Leipold began by asking if Conrey was okay. Leipold also said that she had to give a verbal warning to Conrey and that she realized that other employees frequently sell products in the trauma unit, including Avon, cookies, and other things. However, Leipold noted, "people got a little excited because [Conrey] was distributing Union literature." She again stated that because Hirsch, Dubocq, the head of Human Resources, and the head of Security knew about the incident, she had to issue a verbal warning to Conrey.

Before issuing the warning, Leipold advised Conrey that the next time she punched out to distribute union literature, she should take off her scrubs and go across the street. During this conversation, Leipold handed a verbal warning notice to Conrey. The warning notice stated that the date of the "Oral Warning" was "4/5/97." At the bottom of the notice, Conrey signed a written acknowledgment that her supervisor had given her a copy of "this warning and reviewed it with me." Conrey also

checked a box showing that she agreed with “this warning.” The warning contained the following explanation and comments by Leipold:

Donna was discovered in the Riebel Parkade distributing leaflets onto cars at approximately 06:24 on 3/30/97. Donna was on duty in uniform at the time, but was on her break. Donna did effectively complete her patient care responsibilities and appropriately reported off to a fellow staff nurse and to the charge nurse.

In the portion of the warning form dedicated to reporting “what action is being taken to help employee improve,” Leipold wrote: “I reviewed the solicitation policy and professional concerns with Donna.” Leipold signed the warning both as supervisor and department head. Leipold told Conrey that the warning would go into a file cabinet in Leipold’s desk. Leipold also assured Conrey that the verbal warning would not affect her annual evaluation. In her testimony before me, though, Leipold admitted that she kept the verbal warning for a year. She also explained that Cooper’s policy is to keep these warnings for 1 year and “then use them to formulate evaluations.” Leipold offered to return the confiscated union leaflets to Conrey.<sup>4</sup>

An employee handbook entitled “Summary of Employment Policies and Practices” which Cooper prepared and issued to its hospital employees in 1996 included the following:

#### No Solicitation/No Distribution Policy

No unauthorized solicitation of any kind, including solicitation for membership, subscriptions, raffles, tickets or collections, will be permitted by employees during working time, or at any time in working areas. No distribution of any kind, including circulars or other printed materials, shall be permitted during working time, or any time in the working areas. Any solicitation or distribution interfering with other employees’ work is prohibited. Read Human Resource Policy #1.050.

In July 1997, Cooper issued a similar handbook, with the same title, and the same no solicitation/no distribution policy to its employees. In a companion letter dated July 17, Cooper’s Vice President, Human Resources, Alvin D. Johnson advised Cooper staff members:

This “Summary of Employment Policies and Practices” has been prepared for you.

<sup>4</sup> With the exception of one portion of her testimony, Conrey seemed to be giving her best recollection of her encounters with Leipold on March 31 and April 5. The one exception was her testimony that she was told that the verbal warning would go into her personnel file. Nowhere in her testimony before me did Conrey name a source for that information. For her part, Leipold explained, in a frank and forthright manner, how she treated Conrey’s verbal warning after its issuance. Leipold’s other testimony regarding her remarks to Conrey on March 31 and April 5, corroborates much of Conrey’s testimony. However, Leipold seemed somewhat reluctant to go into details of her remarks to Conrey. When asked to testify about her telephone conversation with Conrey, Leipold’s testimony was sketchy. When asked about the conversation of April 5, Leipold, at first, ventured only that “we talked about the solicitation and the professionalism issues.” Counsel for Cooper found it necessary to keep pressing her for details. As Conrey generally impressed me as the more forthright witness, I have, with the exception noted above, credited her version of her conversations with Leipold on March 31 and April 5.

The policies referred to in this booklet are available to you through your department and can be found in the Human Resources Policy Manual. Please read this booklet and address any questions you may have with your department supervisor.

Please sign the last page of this booklet and return it to Human Resources.

In their prefaces, the 1996 and 1997 editions of the “Summary of Employment Policies and Practices” advise employees to “read this booklet carefully and then keep it in a safe place for future reference.” Both prefaces are careful to state that: “The Cooper Health System policies and procedures are discussed” in the respective booklets.

Cooper Hospital’s Human Resource Policy #1.050, dated 2/94 and approved by Leslie D. Hirsch, provides, in pertinent part:

#### **POLICY:**

Cooper Hospital/University Medical Center has the following policies regarding employees solicitation and/or distribution activity:

1. Oral solicitation or distribution of written material is prohibited *at all* nursing areas, operating rooms, treatment and therapy areas, patient sitting rooms and corridors adjoining or used for access to such rooms.

2. Outside of such immediate patient care areas:

(a) oral solicitation and distribution is prohibited during working time but is permitted during nonworking time such as lunch breaks provided that the schedules and work of other employees who are working is not disrupted.

3. . . . .

#### **APPLICABILITY**

This policy includes all employees, Physicians, Residents, Rotating Residents, Students, Medical Students, Fellows, and Volunteers.

The second page of Human Resources Policy #1.050, in pertinent part, sets forth the following:

#### **PROCEDURE**

The Department Manager is responsible for:

1. . . . .

2. Ordering employees who are engaged in solicitation and/or distribution in work areas and/or during work time to immediately cease their action.

3. . . . .

I find from Conrey’s uncontradicted testimony that the hospital has work areas, where it does not provide patient care. These include laboratories, offices, storage rooms, file rooms, utility rooms, the telephone operators’ room, the kitchen, the laundry, and the central processing department. I also find from the testimony of witnesses Dubocq and Conrey that the Helipad Resuscitation Area and the helipad itself are patient care areas. However, the relevant testimony in the record shows that the remainder of the Parkade is not a patient care area.

The record shows that Cooper has been less than strict in the enforcement of its no-solicitation/no-distribution policy. Conrey has observed solicitation and distribution in the Trauma Unit, where she has regularly worked for the length of her tenure at Cooper Hospital. The Trauma Unit occupies a long hall in which there are 10 beds and nurses’ station from which all the beds are visible. The unit also has three isolated rooms and

a breakroom. Early in 1997, an employee approached Conrey in the Trauma Unit, attempting to sell Tupperware. The employee presented a catalog and asked if Conrey was interested in ordering any Tupperware. Conrey noticed the same catalog at the nurses' station for approximately 2 weeks. At some point, Conrey ordered some Tupperware, and the employee delivered it to Conrey in the Parkade.

At various times during the 3 years preceding the hearing in this case, Conrey observed an Avon Products catalog at the Trauma Unit's nurses' station. Employees were free to study the catalog and fill out an order sheet. Candy is sold by leaving a box of the product at the nurses' station. Employees take whatever candy they want and leave the payment in the box. The box usually remains at the nurses' station for about 2 days. In the summer of 1997, Kathy Leipold bought some of the candy and gave it to the nurses in the Trauma Unit.

During November and December 1997, an employee brought samples of Christmas holiday decorations to the Trauma Unit and offered them for sale. Another employee sold gift baskets during the pre-Christmas period in 1997. The employee solicited sales by proffering a checklist to potential buyers. Employees checked off what they wanted and the seller brought the merchandise to the purchaser, at work. In 1997, an employee solicited sales of operating room caps in the Trauma Unit. In 1996, an employee offered for sale Christmas gift wrap and small Christmas gifts to Trauma Unit employees. The employee brought a catalog with checklists. Employees checked off what they wanted and gave the order to the employee. The seller brought the ordered merchandise to work and gave it to the purchaser.

During the Halloween season of 1997, an employee from the hospital's Central Processing Department brought baskets she had made for candy. She offered them for sale at the Trauma Unit. In October 1997, an employee approached Conrey in the Trauma Unit on behalf of a charity.

Over the years she has been in the Trauma Unit, Conrey has observed the sale of Girl Scout cookies in the unit. Boxes of cookies are left at the nurses' station for about one week. Employees may leave money at the nurses' station and pick up the cookies. If the desired cookies are not present, the potential purchaser may fill out an order form and leave it at the nurses' station.

Further solicitations in the Trauma Unit have included the sale of cheesecakes, candles, decorations, and birdhouses. These solicitations occurred at the nurses' station or elsewhere in the unit. In December 1997, an employee stood near the nurses' station and offered Christmas banners, decorated pillows and tree ornaments for sale. Advertisements for the sale of automobiles have been posted on a bulletin board in the Trauma Unit, near patients' beds.<sup>5</sup>

There is no evidence that Cooper issued any warnings—similar to the kind issued to Conrey, or of any other type—or otherwise disciplined the employees engaging in the solicitations and sales described above. The General Counsel subpoenaed from Cooper all documents showing that employees were disciplined for distributing written materials on Cooper's premises or in the Parkade from January 1, 1992, until September 26. Cooper's response was that there are no such documents.

<sup>5</sup> I based my findings regarding solicitations and distributions in the Trauma Unit upon Conrey's uncontradicted testimony.

### III. ANALYSIS AND CONCLUSIONS

Cooper contends that Section 10(b) of the Act bars the complaint as amended and that the complaint as amended alleges violations of the Act beyond the scope of the underlying unfair labor practice charge. The pertinent portion of Section 10(b) of the Act provides that: "No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board."

The original charge filed by the Union on April 3, alleged that Cooper had violated Section 8(a)(1) of the Act since on or about March 30, by "discriminatorily prohibiting the distribution of union literature, confiscating union literature from its employees and from automobiles in its parking lot, and by physically intimidating its employees because of their union activity." The same charge alleged that on or about April 1, Cooper disciplined Conrey because of her union activity. The Regional Director issued a complaint on June 13 alleging that the policy contained in Cooper's Human Resource Policy #1.050 violated Section 8(a)(1) of the Act. The same complaint also alleged that the enforcement of that policy by Security Guard Craig on March 30, violated Section 8(a)(1) of the Act. Finally, the complaint alleged that Cooper violated Section 8(a)(3) and (1) of the Act by issuing a verbal warning and a written warning to Conrey.

On November 3, the Union filed an amended charge in this case realleging the violations set forth in the original charge and adding allegations of further violations of Section 8(a)(1) growing out of the incident on March 30, and the discussion between Conrey and Leipold on April 5. These added elements included Leipold's telling Conrey that Cooper was applying its no-distribution/no-solicitation rule to distributions on the Union's behalf and that she should not engage in such distribution on Cooper's premises or during her workshift. The amended charge also alleged that Cooper had maintained an unlawfully broad no-solicitation rule since on or about October 3, 1996. The amendments to the original complaint substituted the no-solicitation/no distribution rule in the employee handbook for the rules set forth in the Human Resources Policy #1.050, and otherwise reflected the amended charge's allegations.

In *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989), the Board held that otherwise untimely 8(a)(1) complaint allegations must be closely related to the alleged unfair labor practice allegations recited in the underlying timely filed charge. *Nickles*, 296 NLRB at 928, recited the following three factors which comprise the Board's "closely related" test:

First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of event as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations.

The new allegations involve the issue of whether Cooper's no-solicitation/no distribution rule exceeds the Board's limitations on such rules. The same issue arose in the original charge where the focus was on Human Resource Policy #1.050. The other additional allegations of unlawful conduct involve remarks showing selective enforcement of Cooper's rule against union activity. The timely charge and the initial complaint also alleged such unlawful conduct. Further, the original charge and the amended charge both alleged that Cooper violated Section

8(a)(3) and (1) of the Act by disciplining Conrey for violating Cooper's no-solicitation/no-distribution rule. Thus, the legal theories underlying the original complaint and the amended complaint—that Cooper's no-solicitation/no-distribution policies are unlawfully broad, and that Cooper's enforcement of those policies against union activity and not against other solicitations or distributions constitutes a violation of Section 8(a)(3)—are essentially the same.

Beyond question, the new allegations in the amended charge and the amended complaint arose from the same factual circumstances and sequence of events set out in the timely charge. Cooper's rule and the rule's enforcement against Conrey are involved in both the amended charge and the timely filed charge. Finally, Cooper would most probably have raised the same defense against the original complaint as it has against the amended complaint.

In sum, I find that Section 10(b) of the Act did not bar the allegations in the amended complaint regarding Cooper's maintenance and enforcement of its no-solicitation/no-distribution rule and its imposition of discipline upon Conrey for distributing union literature in the Parkade.

Turning to the "No-Solicitation/No-Distribution Policy" which Cooper has included in its employee handbook, I am confronted by the suggestion in the testimony of Executive Vice President and Chief Operating Officer Hirsch that Cooper's policy regarding that topic is found in Human Resource Policy #1.050. However, I find that Cooper, on the first page of each copy of the employee handbook, which it distributed to each employee, asserted that the handbook contained its "policies and procedures." On the same page, Cooper instructed the reader to "read this booklet carefully and then keep it in a safe place for reference." There has been no showing that Cooper made a similar effort to place Human Resource Policy #1.050 in the hands of individual employees.

That Cooper gave its employees the handbook, containing a "No Solicitation/No Distribution Policy," and told its employees that the handbook contained its "policies and procedures," and did not give its employees a copy of Human Resource Policy #1.050 indicated to Cooper employees that the handbook contained Cooper's policy regarding solicitation and distribution. Therefore, I find that the "No Solicitation/No Distribution Policy" in the employee handbook is Cooper's policy.

Moreover, accepting Cooper's argument that Human Resource Policy #1.050 represents its policy on the solicitation/distribution issue would have little effect on this case. Human Resources Policy #1.050 directs department managers to prohibit solicitation or distribution "in work areas and/or during work time." Such a proscription is the equivalent of the "No Solicitation/No Distribution Policy" contained in the handbook.

The Board, with Supreme Court approval, has recognized that a health care facility can prohibit solicitation and distribution in immediate patient care areas. *Doctors Hospital of Staten Island*, 325 NLRB 730 (1998). The Board has also held that prohibitions of lawful nonworktime solicitation and distribution in areas other than immediate care areas, to which patients and visitors have access, are invalid, absent a showing by the hospital that such a ban is necessary to avoid a disruption of patient care. *Eastern Maine Medical Center*, 253 NLRB 224, 240 (1980). In *NLRB v. Baptist Hospital*, 442 U.S. 773, 786 (1979), the Court added sitting rooms and corridors to the Board's list of "immediate patient care" areas, which included

patients' rooms, operating rooms, and places where patients receive treatment. In so doing, the Court reasoned that in light of "the increased emphasis in modern hospitals on the mobility of patients," hospitals have a valid interest in keeping sitting rooms and corridors free from employee solicitation and distribution. *Id.* at 784. A further basis for the Court's addition of corridors and sitting rooms to the Board's list was that these areas serve "as places for patients to visit with families and friends as well as for doctors to confer with patients' families—often during times of crisis," and these areas should therefore be free from employee solicitation and distribution. *Id.*

Applying the foregoing principles to the policy in Cooper's employee handbook, I find that the prohibition against solicitation in all work areas exceeds the limit, which the Board has imposed on such rules. Contrary to Board policy, Cooper's prohibition applies to nonworking time employee solicitations in working areas other than immediate patient care areas and is thus presumptively invalid. *Health Care & Retirement Corp.*, 310 NLRB 1002, 1005 (1993). Furthermore, Cooper has failed to make the required showing that union solicitation in working areas, which are not immediate patient care areas "would either disrupt care or disturb patients." *Heartland of Lansing Nursing Home*, 307 NLRB 152, 159–160 (1992). That a visitor may be disturbed by such solicitation, as Cooper has attempted to show, is insufficient to displace the employees' right to engage in union activity protected by Section 7 of the Act. See *Eastern Maine Medical Center*, 253 NLRB at 227. Accordingly, I find that Cooper's "No Solicitation/No Distribution Rule" contained in its employee handbook is overly broad and violates Section 8(a)(1) of the Act.

I also find that the Human Resources Policy #1.050, dated February 1994, unlawfully prohibits employees from engaging in solicitation in work areas, which are not immediate patient care areas, during nonworking time. This prohibition is contained in the portion of the policy entitled "PROCEDURE." In that paragraph, Cooper directs its department managers to order employees engaged in solicitation in work areas "and/or during work time to immediately cease their action." Again, Cooper has not justified this prohibition by showing the disruption of patient care or the disturbance of patients. Accordingly, I find that by maintaining this no-solicitation policy Cooper has violated Section 8(a)(1) of the Act.<sup>6</sup>

I also find that Leipold's instructions to Conrey, that she remove her nurses scrubs and leave Cooper's premises the next time she punched out to distribute the literature, occurred in the course of a discussion of Conrey's distribution of union literature. Leipold did not provide any business reason for her instructions. I find, therefore, that Leipold was attempting to restrain Conrey from engaging in a right protected by Section 7 of the Act to engage in union activity. Accordingly, I further find that by Leipold's instructions Cooper violated Section 8(a)(1) of the Act. *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1022 (1991).

Cooper has extended its no-solicitation and no-distribution rules to the Parkade. The General Counsel contends that the

<sup>6</sup> In finding the policy expressed in Cooper's Human Resources manual to be in violation of Sec. 8(a)(1) of the Act, I noted that the amended complaint did not include such an allegation. However, as the facts necessary to this finding were uncontroverted and were fully litigated, Board policy authorizes me to make this finding and provide an appropriate remedy for this violation. See, e.g., *St. Joseph Hospital East, Inc.*, 236 NLRB 1450 fn. 5 (1978).

application of these rules to the Parkade exceeds the limitations imposed by Board policy. Cooper seeks to justify its application of its no-solicitation and no-distribution rules to the Parkade on the ground that it houses an emergency landing area and an emergency treatment facility, and because of the importance of quietude for patients, their families and other visitors. I agree that the helipad and the Helipad Resuscitation Area are patient care areas and thus subject to Cooper's regulation of employee solicitation and distribution. However, Cooper has not shown that the remainder of the six-floor facility is anything more than a parking garage used by employees, and non-employees, including patients, members of their families, and other visitors. Cooper has not met its burden of showing that distribution of union flyers by a hospital employee in the Parkade automobile parking areas, during his or her nonworking time, would disrupt healthcare operations or disturb patients. There was no showing that patients, or their families, or friends spend more time in the Parkade than is necessary to move from a vehicle to the elevator leading to the hospital lobby. Thus, their exposure to union activity is brief and easily avoided by taking the elevator to the Hospital's lobby. I find therefore that by maintaining its no-distribution rule in the Parkade's automobile parking areas, Cooper has restrained and interfered with and coerced its employees in the exercise of their Section 7 right to engage in union activity, and thereby violated Section 8(a)(1) of the Act. *Southern Maryland Hospital Center*, 293 NLRB 1209, 1220 (1989), *enfd.* In relevant part 916 F. 2d 932 (4th Cir. 1990). I further find that by enforcing that rule against employee Donna Conrey in the Parkade parking area and by confiscating the union literature in her possession on March 30, Cooper again violated Section 8(a)(1) of the Act. *St Luke's Hospital*, 300 NLRB 836, 837 (1990).

The record shows that Cooper Hospital has permitted employees to engage in solicitation of sales of merchandise in the Trauma Unit. Further, Cooper has allowed distribution of literature in connection with such solicitation, as well as distribution of the purchased items, in the Trauma Unit, near patients' beds. Cooper has not shown any instance where a member of its management has confronted an employee engaged in such conduct, and ordered him or her to cease violating its rules. Nor has Cooper come forward with any showing that it has disciplined anyone, other than Conrey, for engaging in solicitation or distribution. I find that by selectively enforcing its no-solicitation/no-distribution rules against Conrey's union activity while permitting solicitation and distribution by employees engaged in commercial activity, Cooper violated Section 8(a)(1) of the Act. *K & M Electronics*, 283 NLRB 279 (1987).

I have found that on March 30 and April 5, Leipold admitted to employee Conrey that Cooper's management was willing to permit the sales of Avon products, cookies, cakes, and other things, but was concerned about the distribution of union literature. I find that Leipold's message to Conrey was likely to cause the listening employee to fear punishment if she continued to distribute union literature on Cooper's premises. Accordingly, I find that by Leipold's remarks to Conrey, Cooper further violated Section 8(a)(1) of the Act. *Alexian Brothers Medical Center*, 307 NLRB 389 (1992).

The record leaves no doubt that Cooper issued a verbal warning to Conrey on April 5, in response to her distribution of union literature in the Parkade. Leipold's testimony showed that as a matter of Cooper's policy, Leipold kept the warning in her desk for 1 year and used it to formulate Conrey's evaluation

as a nurse. Thus, contrary to Cooper's position, that this was nondisciplinary "verbal counseling" (Cooper's Br., p. 22), I find that the verbal warning issued to Conrey on April 5, was disciplinary. I also find that Cooper violated Section 8(a)(3) and (1) of the Act by using the verbal warning to punish Conrey for engaging in union activity. *Funk Manufacturing Co.*, 301 NLRB 111, 113 (1991).

#### CONCLUSIONS OF LAW

1. The Respondent, The Cooper Health System, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. JNESO, District 1, International Union of Operating Engineers, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by:

(a) Prohibiting employees from engaging in union solicitation during nonworking time outside of immediate patient care areas of its hospital.

(b) Prohibiting employees from engaging in union solicitation or distribution of union literature in the parking areas of the Parkade during nonworking time.

(c) Prohibiting employees from distributing union literature during nonworking time in nonworking areas of its hospital and while wearing scrubs.

(d) Enforcing a no-solicitation/no-distribution rule against union activity while permitting solicitation and distribution for commercial and other nonunion related activity.

(e) Telling employees that Cooper is enforcing a no-solicitation/no-distribution rule against union activity while permitting solicitation and distribution for commercial and other nonunion related activity.

(f) Confiscating union literature from employees in the course of enforcing a prohibition against distribution of union literature in the parking areas of the Parkade during nonworking time.

4. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by disciplining employee Donna Conrey with a verbal warning because she engaged in union activity.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent issued a written verbal warning to employee Donna Conrey in violation of Section 8(a)(3) and (1) of the Act, I shall order the removal of that warning from Respondent's files and records and notification to her in writing that this has been done and that the warning will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## ORDER

The Respondent, The Cooper Health System, Camden, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from engaging in union solicitation during nonworking time outside of immediate patient care areas of the hospital.

(b) Prohibiting employees from engaging in union solicitation or distribution of union literature in the automobile parking areas of the Parkade during nonworking time.

(c) Prohibiting employees from distributing union literature during nonworking time in nonworking areas of the hospital.

(d) Prohibiting employees from distributing union literature while wearing hospital scrubs or other hospital uniforms.

(e) Selectively and discriminatorily enforcing a no-solicitation/no-distribution rule against union activity while allowing solicitation or distribution regarding commercial or other non-union activity.

(f) Telling employees that Cooper Hospital is selectively and discriminatorily enforcing a no-solicitation/no-distribution rule against union activity while allowing solicitation and distribution regarding commercial or other non-union activity.

(g) Confiscating union literature from employees.

(h) Issuing written verbal warnings to employees, or otherwise disciplining employees because they engage in union activity protected by Section 7 of the Act.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from Respondent's files any reference to the written verbal warning notice, which it issued to Donna Conrey on April 5, 1997, and within 3 days thereafter, notify her, in writing, that this has been done and that the warning will not be used against her in any way.

(b) Rescind the overly broad no-solicitation rule promulgated by Respondent in its Summary of Employment Policies and Practices dated 1996-1997 and in the 1997-1998 edition of the same employee manual.

(c) Rescind the overly broad no-solicitation rule set forth in the portion of Human resource Policy #1.050 under the heading "PROCEDURE."

(d) Within 14 days after service by the Region, post at its facility in Camden, New Jersey copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility in-

volved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 3, 1997.

(e) Within 21 days after receiving service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit employees from engaging in union solicitation during nonworking time outside of immediate patient care areas of the hospital.

WE WILL NOT prohibit employees from engaging in union solicitation or distribution of union literature in the automobile parking areas of the Parkade during nonworking time.

WE WILL NOT prohibit employees from distributing union literature during nonworking time in nonworking areas of the hospital.

WE WILL NOT prohibit employees from distributing union literature while wearing hospital scrubs or other hospital uniforms.

WE WILL NOT selectively and discriminatorily enforce a no-solicitation/no-distribution rule against union activity while allowing solicitation or distribution regarding commercial or other nonunion activity.

WE WILL NOT tell employees that Cooper Hospital is selectively and discriminatorily enforcing a no-solicitation/no-distribution rule against union activity while allowing solicitation and distribution regarding commercial or other nonunion activity.

WE WILL NOT confiscate union literature from our employees.

WE WILL NOT issue written verbal warnings to employees, or otherwise discipline employees because they engage in union activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the written verbal warning notice, which we issued to Donna Conrey on April 5, 1997, and within 3 days thereafter, notify her, in writing, that this has been done and that the warning will not be used against her in any way.

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL rescind the excessively broad no-solicitation rule which we promulgated in our Summary of Employment Policies and Practices dated 1996-1997 and in the 1997-1998 edition of the same employee manual.

WE WILL rescind the overly broad no-solicitation rule set forth in the portion of our current Human Resource Policy #1.050, under the heading "PROCEDURE."

THE COOPER HEALTH SYSTEM